No. 9760.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HANS SCHWARTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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Preliminary Statement.

This is an appeal from an order of the District Court denying a petition for naturalization filed by Hans Schwartz under the Naturalization Act of June 29, 1906, as amended. (Secs. 3, 4, 34 Stat. 596; 37 Stat. 737; Title 8, U. S. C., Secs. 357, 379, 382.)

Following lawful admission on October 20, 1933, the appellant filed a Declaration of Intention to become a citizen in the United States District Court at Los Angeles, California, April 14, 1934. Thereafter the appellant resided in the United States until January 15, 1936, when he departed from the United States for England. He was then under contract as a motion picture director with the United Artists Corporation, Hollywood, California, and

was proceeding abroad solely in the employment of this corporation. The corporation was then engaged in the production and distribution of motion pictures in the United States and abroad. Prior to his departure at that time the appellant applied for and secured a "Permit to Reenter the United States," under the provisions of Section 10 of the Immigration Act of 1924 (8 U. S. C. A. 210). Appellant remained in England and in the employment of said corporation until September 20, 1937, when he was re-admitted to the United States through the port of New York.

Thus, the appellant had been absent from the United States for a period of twenty months immediately preceding the filing of his petition for citizenship on October 31, 1939.

His petition for naturalization was denied August 15, 1940, on the ground that his 20-month absence from the United States had broken the continuity of residence required by Section 4 of the Naturalization Act, as amended, the court having found that the appellant was not excepted from this requirement under the Act of June 25, 1936.

Issue.

We agree with appellant that two issues are presented in this case:

1. Whether appellant, who was abroad when the Act of June 25, 1936, became law, could apply for the benefits of that act upon his return to the United States without regard to the time that return took place.

2. Whether appellant's application for the benefits of the Act of June 25, 1936, could be filed after that act had been repealed in part by the Act of June 29, 1938.

Statutes.

The 4th subdivision of Section 4 of the Act of June 29, 1906 (34 Stat. 596) as amended by the Act of March 2, 1929 (45 Stat. 1513; 8 U. S. C. A. 382), provides that a petitioner for naturalization must have five years' continuous residence immediately preceding his admission to citizenship:

> "No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years * * *."

and the second paragraph of the said Section 4 further provides:

> "Absence from the United States for a continuous period of one year or more during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship shall break the continuity of such residence."

Exception was made, however, to the "continuous residence" provision by subsequent legislation in the Act of June 25, 1936 (49 Stat. 1925). This act amended the above quoted paragraph by striking out the period after the word "residence" at the end of the paragraph and inserted a comma in lieu thereof. The following provision was then added:

> "* * * except that in the case of an alien declarant for citizenship employed by an American

firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States * * *, no period of residence outside the United States shall break the continuity of residence if (1) *prior to the beginning of such period (whether such period begins before or after his departure from the United States) the alien has established to the satisfaction of the Secretary of Labor that his absence from the United States for such period is * * * to be engaged in the development of such foreign trade and commerce* * * *, and (2) such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose." (Emphasis ours.)

Section 2 of the Act of June 25, 1936, further provides that:

"*Section 2.* No period of residence outside the United States during the five years immediately preceding the enactment of this act shall be held to have broken the continuity of residence required by the Naturalization Laws if the alien proves to the satisfaction of the Secretary of Labor and the court that during all such period of absence he has been under employment by, or contract with, the United States, or such American institution of research, or corporation, described in Section 1 hereof, and has been carrying on the activities described in this act in their behalf (49 Stat. 1925)."

The Act of June 25, 1936, was subsequently amended by the Act of June 29, 1938 (52 Stat. 1247) and in the Congressional report the proposed legislation indicated by brackets what portion of the existing law was to be omitted. There was included therein all of Section 1 of the Act of June 25, 1936, above quoted. Section 2 of the 1936 Act was indicated as existing legislation which was not to be changed. It was in this form that the proposed legislation finally became law by the Act of June 29, 1938, and the amendment reads as follows:

> "Absence from the United States for a continuous period of more than six months and less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition, and the date of final hearing, shall be presumed to break the continuity of such residence, but such presumption may be overcome by the presentation to the naturalization court of satisfactory evidence that such individual had a reasonable cause for not returning to the United States during such absence. Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship immediately preceding the date of filing the petition for naturalization or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, except, that in the case of an alien—

(a) who has been lawfully admitted into the United States for permanent residence.

(b) who has resided in the United States for at least one year thereafter, and

(c) who has made a declaration of intention to become a citizen of the United States, who shall be deemed an eligible alien for the purposes of this section and who thereafter has been sent abroad as an employee of or under contract with the Government of the United States, or who thereafter proceeded abroad as an employee or representative of, or under contract with an American institution of research recognized as such by the Secretary of Labor, or as an employee of a firm or corporation engaged in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or any such eligible alien as above defined who has proceeded abroad temporarily and has within a period of one year of his departure from the United States become an employee or representative of, or who is under contract with such an American institution of research, or has become an employee of such an American firm or corporation, no such absence shall break the continuity of residence in the United States if—

(1) Prior to the beginning of such absence, or prior to the beginning of such employment, contract, or representation on behalf of an American institution of research or an American firm or corporation as aforesaid, such alien has established to the satisfaction of the Secretary of Labor that his absence

for such period is to be on behalf of such government or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged solely or principally in the development of such foreign trade and commerce, or whose residence abroad is necessary to the protection of the property rights abroad of such firm or corporation; and

(2) Such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose."

The amendment of June 29, 1938, to the Act of June 25, 1936, included therein the following saving clause:

"This amendment shall not affect cases of aliens who prior to the date of its enactment have established to the satisfaction of the Secretary of Labor, pursuant to an Act entitled 'An Act to amend the Naturalization Laws in respect of residence requirements, and for other purposes,' approved June 25, 1936, that absence from the United States was to be or had been for the purposes of carrying on activities described therein."

ARGUMENT.

On the First Issue.

With respect to appellant's absence during the period from January 15, 1936, to June 25, 1936 (date of passage), it would seem that he may take advantage of the provisions of Section 2 of the Act of June 25, 1936. Counsel has noted that the language of this section is silent as to the time for making an application for its benefits (Opening Brief, p. 10). Consequently, it would appear that such application may be made at any time after the passage of the 1936 Act for that portion of the period of appellant's residence outside of the United States prior to passage of the said 1936 Act.

With respect to the remainder of his absence dating from the passage of the act on June 25, 1936, to September 10, 1937, when the appellant returned to the United States, continuity of residence must be established under the provisions of Section 1 of the Act of 1936, if at all.

Attention is invited to the parenthetical phrase included in Section 1 of the 1936 Act, "whether such period begins before or after his departure from the United States." Use of this phrase gives authority for according the exempting benefits of the law to an applicant whose employment comes within its terms notwithstanding he might have left the United States before application therefor has been made. But the act clearly requires the establishment of the facts concerning an alien's employment to be made to the satisfaction of the Secretary af Labor "prior to the beginning of such period." The appellant failed to make application to the Secretary of Labor for the required finding before one year had elapsed after the effective date of the amendment on June 25, 1936. Having been

continuously absent from this country during that period (June 25, 1936, to June 25, 1937), it must be concluded that the continuity of his residence has been broken by this absence of one year's duration. This interruption of the continuity of residence for naturalization purposes was due jointly to failure to apply to the Secretary of Labor for the finding as to the purpose of absence (after the approval of the Act of June 25, 1936) until more than one year of continuous absence from the United States had ensued; and, operation of the basic provision of law that absence from this country for a continuous period of one year or more breaks the continuity of residence for naturalization purposes. Had Mr. Schwartz submitted an application to the Secretary of Labor for a finding as to the purpose of his absence before one year had elapsed subsequent to June 25, 1936, he might have been accorded the exemption benefits of the measure for that portion of his absence after submission of his application. In that event his absence subsequent to approval of the act and before submission of his application to the Secretary of Labor being of less than one year's duration, would not have conclusively broken the continuity of his residence but would have raised the presumption of interrupted residence subject to rebuttal under the law through presentation of proof to the naturalization court that he had a reasonable cause for not returning to the United States during that period.

Neither in the House nor in the Senate was there any extensive or important discussion of the bill which later

became the Act of June 25, 1936 (H. R. 4900). A part of the very brief committee report acompanying the bill has been quoted by counsel (Opening Brief, p. 12). The paragraph following that part quoted by counsel reads as follows:

> "The safeguards against possible abuses of the relief granted by this bill are so well covered by limitations stated in the bill that prompt enactment of this measure will safely extend needed relief to a limited group of aliens who have already demonstrated that their admission to citizenship will in all probability prove advantageous to national public welfare and progress."

One of the safeguards mentioned was that requirement, previously pointed out, which calls for application to be made before the beginning of the period of foreign residence. Enjoyment of the benefits accorded persons excepted by this act was limited to those whose applications were approved prior to the beginning of the residence for which exemption was claimed.

As pointed out by the District Court [R. 13] the requirements of naturalization must be rigidly enforced and strictly construed in favor of the government and against the applicant, and any doubt as to the merit of the application must be resolved in favor of the government.

> "But if there is any doubt as to the proper construction of this statute, * * * then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor."
>
> *Hannibal etc. v. Packet Company,* 125 U. S. 260.

The naturalization statute, being a conditional grant of privilege by the government, must be construed in favor of the government.

United States v. Schwimmer, 279 U. S. 644;
United States v. Macintosh, 283 U. S. 605;
United States v. Ginsberg, 243 U. S. 472;
United States v. Manzi, 276 U. S. 463.

On this point the court in *United States v. Macintosh, supra,* at page 626, said:

> "The Naturalization Act is to be construed 'with the definite purpose to favor and support the government.' "

On the Second Issue.

As has been pointed out by the lower court [R. 12]:

> "* * * the 1938 amendment of the language of the exception added by the 1936 amendment does not in any way affect Mr. Schwartz. Thus, whether we apply the 1936 or the 1938 exception to Mr. Schwartz, the result is the same."

This is apparent from the language of the statute. An alien who could have obtained benefits under Section 1 of the 1936 Act is not precluded from obtaining those same benefits after the apparent repeal of Section 1 by the 1938 Act if he complies with the 1938 Act by "prior to the beginning of such absence, or prior to the beginning of such employment, contract, or representation on behalf of an American institution of research or an American firm or corporation as aforesaid," he establishes to the satisfaction of the Secretary of Labor he is eligible to

receive the exemption. As pointed out by the court in commenting upon that portion of the act relating to interruption of residence [R. 12]:

> "* * * except for the inclusion of the language with respect to the period between the date of filing the petition and the date of final hearing (which does not concern Mr. Schwartz), the above indicated portion of the act has merely been recast."

The 1938 Act requires the alien to establish his eligibility for exemption *prior* to the beginning of his foreign employment. This is a re-enactment of the same requirement contained in the 1936 Act. This very fact indicates that Congress had no intention of permitting aliens to apply for the benefits under the act *after* the beginning of the period of foreign employment, or, as in the case at bar, after the alien had returned to the United States. If this was the intent, no purpose would have been served by including in the act the words, "*Prior* to the beginning of such absence * * *." We submit that the plain language speaks for itself.

The appellant was absent from the United States after the passage of the 1936 Act for more than a year, *i. e.,* during the period June 25, 1936, to September 20, 1937. After his return to the United States he remained silent until after the passage of the 1938 Act, when on June 12, 1939, for the first time he made application to establish the facts of his employment for one of the purposes specified in the said act. The period of his absence for which he could have claimed the benefits of the act commenced while abroad and by making timely application in due form he could have received the benefits of the act. He failed to do so.

The naturalization statute states, "Absence from the United States for a continuous period of one year or more * * * shall break the continuity of such residence." Schwartz resided outside the United States for more than one year after the passage of the exempting act of June 25, 1936, and did not make formal application to establish his exemption from the operation of the former statute during the entire period of that absence, which was for the period of one year, two months and twenty-five days, June 25, 1936, to September 20, 1937. In fact, formal application for the benefits of the 1936 Act exempting him from the operation of the statute breaking continuity of residence was not executed until the period of a year, eight months and twenty-two days had elapsed after appellant returned to the United States (*i. e.,* he returned on September 20, 1937, and executed application June 12, 1939).

Counsel has appended to his brief a full statement of the opinion rendered by the United States District Court at Chicago, Illinois, in the case of *Charles Theodore Zaroal.* In that case the court ruled that an alien who had been continuously employed in the service of an American owned corporation in its foreign trade might at any time upon his return to the United States after June 25, 1936, present his application and be given the benefits of the Act of 1936 as a resident in a foreign country while in the employ of an American owned corporation. The *Zaroal* case was considered by the lower court in the case at bar, but Judge Jenney could not entirely follow that decision [R. 14].

Conclusion.

It is submitted that the facts and the law clearly show that appellant is not entitled to naturalization and appellee therefore respectfully urges that the decision of the court below should be affirmed.

Respectfully submitted,

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